



In the Matter of:

**TOD N. ROCKEFELLER,
COMPLAINANT,**

**ARB CASE NO. 03-048
ALJ CASE NO. 2002-CAA-0005**

v.

**U.S. DEPARTMENT OF ENERGY,
CARLSBAD AREA OFFICE,**

RESPONDENT,

and

**TOD N. ROCKEFELLER,
COMPLAINANT,**

**ARB CASE NO. 03-084
ALJ CASE NO. 2003-ERA-10**

v.

DATE: August 31, 2004

**U.S. DEPARTMENT OF ENERGY,
CARLSBAD AREA OFFICE,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Esq., *St. Augustine, Florida*

For the Respondent:

Elizabeth C. Rose, Esq., *U.S. Department of Energy, Carlsbad, New Mexico*

**ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER OF
DISMISSAL, IN PART, AND REMAND, IN PART**

Tod N. Rockefeller filed whistleblower complaints with the United States Department of Labor alleging that the United States Department of Energy, Carlsbad Field Office (DOE), violated the employee protection provisions of the Clean Air Act, 42

U.S.C.A. § 7622 (West 1995) (CAA); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610 (West 1995) (CERCLA); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003) (SWDA); and the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. § 5851 (West 2004) (ERA) (collectively, the whistleblower acts).¹ DOE requested that we consolidate the above-captioned cases. In view of the common parties, and the related evidence and issues presented, and in the interest of administrative economy, we consolidate these cases.²

Department of Labor Administrative Law Judges (ALJ) recommended that Rockefeller's complaints be dismissed.³ Rockefeller appealed. For the reasons that follow, we dismiss ARB No. 03-048 but remand ARB No. 03-084.

BACKGROUND

Rockefeller was employed as an Environmental Specialist at DOE from April 1993 to December 1997. In September 1997 Rockefeller filed the first of what would become a series of complaints against DOE alleging that he had been subjected to various adverse actions in retaliation for activities protected by the whistleblower statutes.⁴ DOE terminated Rockefeller's employment on December 10, 1997.

¹ The complaint in ARB No. 03-084 is captioned "New DOL Environmental Whistleblower Complaint" and indicates that "Mr. Rockefeller hereby files this new environmental whistleblower complaint . . ." The ALJ's Recommended Decision and Order (R. D. & O.), however, states that "it appears that the complaint was orally modified to allege a violation under Section 211 of the Energy Reorganization Act of 1974, as amended 42 U.S.C. 5881 [sic], and was treated as such by OSHA." March 28, 2003 R. D. & O. at 1. We will consider the complaint as alleging violations of the environmental statutes and the ERA. We note that DOE would be immune from a complaint seeking monetary damages under section 5851 of the ERA. *Pastor v. Veterans Affairs Med. Cent.*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003).

² Cf. 29 C.F.R. §§ 7.13 (consolidating Federal construction contract cases), 8.14 (Federal service contract cases).

³ *Rockefeller v. United States Department of Energy*, 2002-CAA-0005 (ALJ Jan. 24, 2003); *Rockefeller v. United States Dep't of Energy, Carlsbad Field Office*, 2003-ERA-10 (ALJ Mar. 28, 2003).

⁴ See *Rockefeller v. Carlsbad Area Office, United States Dep't of Energy*, ARB Nos. 99-002 (*Rockefeller I*), 99-067 (*Rockefeller II*), 99-068 (*Rockefeller III*), and 99-063 (*Rockefeller IV*), ALJ Nos. 98-CAA-10, 99-CAA-1, 99-CAA-4 and 99-CAA-6 (ARB Oct. 31, 2000); *Rockefeller v. Carlsbad Area Office, United States Dep't of Energy*, ARB No. 00-039 (*Rockefeller V*), ALJ Nos. 99-CAA-21, 99-CAA-22 (ARB May 30, 2001); *Rockefeller v. Abraham*, Nos. 01-2054, 00-2480, 2001 WL 1434623 (10th Cir. Nov. 15, 2001)(appeal of New Mexico District Court D.C. No. 99-CIV-1059 PJK/KBM, Sept. 29, 2000); *Rockefeller v. Department of Energy*, Initial Decision of the Merit Systems Protection Board (MSPB Doc. No. DE-0752-98-0138-I-1 (Apr. 6, 1998)); Complaint of Tod N. Rockefeller against the United States. Dept. of Energy's Carlsbad Area Office, Decision of the U.S. Office of Special

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JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the employee protection provisions of the environmental and nuclear whistleblower statutes.⁵ The ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the statutes. The ARB engages in de novo review of the ALJ's recommended decision.⁶

Likewise, the Board reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.⁷ The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.⁸ Thus, pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." A "material fact" is one whose existence affects the outcome of the case.⁹ And a "genuine issue" exists when the nonmoving party produces sufficient evidence of a material fact that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence.¹⁰

Counsel (OSC File No. MA-97-1639, Sept. 24, 1997); *Rockefeller v. LABR*, Dist/Ag docket; 99-002, 10th Cir. Case No. 00-9545 (appeal of *Rockefellers I-V*), dismissed for lack of prosecution, Nov. 20, 2001.

⁵ See 29 C.F.R. § 24.8 (2001); see also Secretary's Order No. 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

⁶ See Administrative Procedure Act, 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

⁷ *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

⁸ *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).

⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹⁰ *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968).

Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.¹¹ The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.¹² If the non-moving party fails to sufficiently show an element essential to his case, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."¹³

Accordingly, the Board will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.¹⁴

DISCUSSION

To prevail on these whistleblower complaints, Rockefeller must prove these essential elements: that he had an employment relationship with DOE, that he engaged in protected activity of which DOE was aware, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action.¹⁵

1. ARB No. 03-048

On December 9, 1997, Rockefeller signed a "Notice of Trespass Warning" in conjunction with the termination of his employment. This document states:

¹¹ *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

¹² *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

¹³ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

¹⁴ *See Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999).

¹⁵ *See Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). Under the ERA, Rockefeller must show that the protected activity was a "contributing factor" in the adverse action. 42 U.S.C.A. § 5851 (b)(3)(C).

I Tod N. Rockefeller . . . understand that this is a formal “Trespass Warning Notification.” The Department of Energy (DOE), Carlsbad Area Office hereby withdraw their consent to allow me on DOE property and all buildings used by the DOE, Carlsbad Area Office and its contractors. As of close of business this date, December 9, 1997, I will remain off all above premises. I understand that a copy of this notification will be provided to the Carlsbad Police Department as an official document. Furthermore, I understand that I will be arrested for any violation of this restriction.¹⁶

On June 11, 2001, Rockefeller entered DOE premises in an attempt to obtain a document from one of its employees. The local police issued him a criminal trespass summons, and on June 14, 2001, DOE distributed an internal memorandum to its contractor and subcontractor managers advising that Rockefeller was not to be allowed admission to any DOE property under any circumstances.¹⁷

On July 21, 2001, Rockefeller filed a whistleblower complaint. The ALJ permitted Rockefeller to amend his complaint on August 27, 2002. In this Amended Complaint, Rockefeller claims that he engaged in protected activity when he trespassed at DOE and when he filed the previous whistleblower complaints against DOE. He alleges that DOE retaliated with various unspecified adverse actions (“coercion, restraint, retaliation and other adverse actions”). He also alleges that DOE blacklisted him when it distributed the June 14 memo and vilified him on the Internet.¹⁸

DOE moved for summary decision on the grounds that “[c]omplainant’s claims have been litigated and decided with finality” and “[c]omplainant has failed in his burden of proof to demonstrate that the June 14, 2001 memorandum constituted ‘blacklisting.’”¹⁹ Rockefeller responded to DOE’s summary decision motion.²⁰

¹⁶ Answer to Amended Complaint and Renewed Motion for Summary Judgment, Exhibit 11.

¹⁷ *Id.*

¹⁸ Amended Complaint para. 1, 3, 4, 23, 25.

¹⁹ Answer to Amended Complaint and Renewed Motion for Summary Judgment at 12-13.

²⁰ Rockefeller’s response is dated January 7, 2003, and is titled “Complainant’s Sworn Response to Respondents’ Renewed Motion for Summary Judgment, His Motion to Strike Insufficient Defense to Amended Complaint and His Motion for Partial Summary Judgment.” We will refer to this document as Rockefeller’s “Response.”

We agree with the ALJ's conclusion that, he is collaterally estopped from relitigating claims which arose during his employment there.²¹ Rockefeller, however, is not estopped from now litigating his blacklisting claim since, of course, blacklisting may occur after employment is terminated. Therefore, since Rockefeller is estopped from relitigating previous claims that arose when DOE employed him, and he has otherwise specified only blacklisting as the adverse action which DOE has taken against him since his employment was terminated, we only address Rockefeller's blacklisting claim.

This Board discussed the elements of a blacklisting claim in *Pickett v. Tennessee Valley Authority*:

Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. . . . In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place.²²

DOE argued below that it was entitled to summary decision on Rockefeller's blacklisting claim because Rockefeller had not demonstrated that the internal memorandum concerning his trespassing constituted blacklisting. We have found that blacklisting was the only adverse action cognizable in Rockefeller's complaint. Proof of adverse action is essential to prevail on a whistleblower claim. Thus, whether or not DOE blacklisted Rockefeller is a material fact in Rockefeller's case. Therefore, in opposing summary judgment, Rockefeller had the burden to establish blacklisting. At this stage of the litigation, he did not have to prove blacklisting by a preponderance of the evidence. In opposing summary judgment, he had only to produce sufficient evidence that a genuine fact exists as to whether DOE blacklisted him.

Rockefeller did not produce any evidence that DOE blacklisted him. His response to DOE's summary judgment motion, though verified under oath, contains little more than conclusive statements that DOE blacklisted him. He provided no evidence that DOE, by issuing the internal memorandum about his trespassing or by "vilifying" him on the Internet, intended to prevent Rockefeller from obtaining employment. Therefore, because no genuine issue exists as to whether DOE blacklisted Rockefeller, we grant summary judgment to DOE and dismiss Rockefeller's complaint.

²¹ See January 24, 2003 Recommended Order at 6.

²² ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18, slip op. at 8-9 (ARB Nov. 28, 2003) (citations omitted).

2. ARB No. 03-084

On January 18, 2003, Rockefeller applied for a position as a Physical Scientist pursuant to a vacancy announcement that DOE had published. The announcement indicated that the position was open only to Carlsbad Field Office (CBFO) employees.²³ On January 27, 2003, Rockefeller filed a whistleblower complaint alleging that DOE refused to rehire him “obviously in retaliation for his environmental whistleblower protected activity, including his case pending before Judge Solomon.” We read Rockefeller’s complaint as alleging that DOE discriminated against him by not hiring him for the physical scientist position because he had filed previous whistleblower complaints against DOE, the latest of which was pending before ALJ Solomon (ALJ No. 2002-CAA-0005, the consolidated case herein). He also asserts that because DOE unlawfully terminated his employment in 1997, he therefore is a current DOE employee and qualifies for the position.

DOE moved for summary decision on March 18, 2003. It argued that the “decision to limit the area of qualification for the position in dispute was not ambiguous, it made a clear distinction between current and former employees and specified that only ‘current’ CBFO employees would be considered.” Thus, it did not consider Rockefeller’s application “simply because he [was] not a current CBFO employee.”²⁴ DOE mailed its motion via priority mail to Rockefeller’s attorney on March 18, 2003.²⁵ It mailed the motion to the ALJ, also on March 18, 2003, via express mail.²⁶

Rockefeller, therefore, is deemed served with the motion on March 18.²⁷ Thereafter, Rockefeller had 15 days in which to respond to DOE’s motion.²⁸ But on

²³ See Respondent’s Reply to Complainant’s Opening Brief and Motion for Summary Reversal and Motion for Summary Judgment, Exhibit 2.

²⁴ See Respondent’s Reply to Complainant’s Request for Hearing and Motions for Remand for Proper Investigation and for Partial Summary Judgment and Respondent’s Motion for Summary Decision and Motion to Enjoin Complainant From Filing Further Complaints on Matters Collaterally Estopped, Having Been Decided with Finality at 2.

²⁵ *Id.* at Certificate of Service.

²⁶ *Id.*

²⁷ 29 C.F.R. § 18.3 (b) (“Service of any document upon any party [or the party’s attorney] may be made by personal delivery or by mailing a copy to the last known address.”); 29 C.F.R. § 18.4 (c)(2) (“Service of all documents other than complaints is deemed effected at the time of mailing.”).

²⁸ 29 C.F.R. § 18.6 (b) (“Within ten (10) days after a motion is served, or within such period as the administrative law judge may fix, any party to the proceeding may file an answer in support or in opposition to the motion, accompanied by such affidavits or other evidence as he or she desires to rely upon.”); 29 C.F.R. § 18.4 (c)(3) (“Whenever a party has the right or is required to take some action within a prescribed period after the service of a

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March 28, 2003, before receiving a response from Rockefeller, the ALJ granted DOE's motion for summary decision and dismissed Rockefeller's complaint.²⁹ Granting DOE's motion for summary judgment and dismissing Rockefeller's complaint on March 28th, therefore, constitutes error because Rockefeller's opportunity to respond to the motion had not expired. And Rockefeller did not waive his opportunity to respond because, on April 3, 2003, he filed a Request for Reconsideration of the ALJ's March 28th order in which he specifically objected to the ALJ's premature ruling. The ALJ, however, denied the request for reconsideration on July 3, 2003.

CONCLUSION

We **DISMISS** Rockefeller's complaint in ARB No. 03-048 because, in opposing the motion for summary decision, he did not demonstrate that a genuine issue exists as to whether DOE blacklisted him. In ARB No. 03-084, we **REMAND** for proceedings consistent with this opinion because the ALJ erred in granting DOE's motion for summary decision and dismissing the complaint before Rockefeller's opportunity to respond to the motion had expired.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.”).

²⁹ *Rockefeller v. United States Dep't of Energy Carlsbad Field Office*, 2003-ERA-10 (ALJ Mar. 28, 2003).